IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

Ex.SA.No. 10 of 2007()

AS.1/2007 of D ISTRICT COURT,THIRUVANANTHAPURAM
E.A.966/06 IN E.P.715 IN
RCP.43/2002 of PRL.M.C.,THIRUVANANTHAPURAM

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: APPELLANT/APPELLANT/PETITIONER:

JOHN JEFRY TENNYSON,
T.C.34/854, JOHN ANN ASHRAM, VALIYATHOPE,
VALLAKKADAVU, THIRUVANANTHAPURAM.

BY ADV. SRI.D.KISHORE

RESPONDENTS: RESPONDENT/CR.PETNR.(DECREE HOLDER & JDGMT.DEBTOR)

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1. VIVIAN,
T.C.11/186891), TILAK NAGAR, NALANCHIRA,
THIRUVANANTHAPURAM.

2. N. PUSHPAKUMARAN NAIR,
T.C.34/854, JOHN ANN ASHRAM, VALIYATHOPE,
THIRUVANANTHAPURAM.

BY

THIS EXECUTION SECOND APPEAL HAVING COME UP FOR ADMISSION ON 11/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER IN I.A.1605/07 IN EX.S.A.10/2007

11.9.2007 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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Ex.S.A. NO. 10 OF 2007

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Dated this the 11th day of September, 2007

JUDGMENT

Petitioner in E.A.966/2006 in E.P.715/2005 in R.C.P.43/2002 an application filed under Rule 97 of Order XX1 of Code of Civil Procedure on the file of Munsiff Court, Thiruvananthapuram is the appellant. First respondent is the decree holder and second respondent is the judgment debtor, the tenant in R.C.P.43/2002. First respondent obtained an order of eviction under section 11(2) and 11(3) of Kerala Buildings (Lease and Rent Control) Act in respect of building in R.C.P.43/2002. E.P.715/2005 was filed for execution of the order of eviction. At that stage, E.A.966/2006 was filed by appellant contending that the building is in his absolute possession and enjoyment and as per decree in O.S.1064/1997 on the file of Munsiff Court, Thiruvananthapuram first respondent is only a co-owner along with appellant and has not perfected

title by adverse possession and order of eviction was obtained without the junction of other co-owners and therefore first respondent is not entitled to execute the order and take delivery of the building.

2. Learned Munsiff on the evidence of P.W.1 and Exts.A1 to A6 and Exts.B1 to B7 dismissed the application holding that appellant himself was examined as CPW2 before Rent Control Court and case of the appellant that he obtained possession from the tenant was not accepted and documents produced by appellant did not establish his right or possession and first respondent is therefore entitled to get delivery of possession of the building in execution of the decree. Application was dismissed. Appellant challenged that order before District Court, Thiruvananthapuram in A.S.1/2007. Learned District Judge on

reappreciation of evidence, dismissed the appeal. It is challenged in second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel appearing for appellant is that in O.S.1064/1997 first respondent sought a decree for injunction claiming exclusive right over the property, including plaint schedule building contending that he has perfected title by adverse possession and under Ext.A4 judgment, civil court found that the claim is not sustainable and first respondent is only a co-owner along with the appellant and defendants 1, 3 and 4 in the said suit and first respondent has no exclusive title to the building. It was argued that though appellant was examined as CPW2 and his evidence was not accepted by the Rent Control Court, the question whether as co-owner first

respondent is entitled to take delivery of the building from the possession of appellant who is another co-owner was not considered by the executing court or first appellate court and in such circumstance the order is unsustainable. Learned counsel also argued that the question whether first respondent is entitled to execute the order as against the other co-owner is to be decided in the petition itself and not in a separate suit and in view of Ext.A4 judgment, though first appeal is pending against it, which is binding on first respondent he is not entitled to take delivery of the property from the appellant.

5. On hearing the learned counsel and going through the orders of the courts below and on the facts and circumstance of the case, I do not find any substantial question of law involved in the

appeal.

6. The order sought to be executed is the order of eviction in R.C.P.43/2002 obtained against second respondent, the tenant by first respondent. In the R.C.P second respondent tenant had contended that the building was surrendered to the appellant and appellant is in possession of the property. Appellant was examined as CPW2 a witness for the tenant. The Rent Control Court considered the evidence of appellant as CPW2 and found that his evidence is not credible or reliable. The trial court as well as the first appellate court considered this aspect, while considering the claim of the appellant that first respondent is not entitled to execute the order of eviction obtained against second respondent. The appellant himself had filed an affidavit in O.P.23234/1999 which was produced in the RCP where appellant has

unambiguously stated that he had sold 21 ½ cents of land including the petition schedule building to one Wilfred and his wife for Rs.1,00,000/- and put them in possession of the property and appellant is not in possession of the said property. This aspect was considered by Rent Control Court in the order of eviction in R.C.P.43/2002. The Rent Control Court found that though as CPW2 appellant contended that eventhough Ext.A23 sale deed was executed and he received a consideration of Rs.1,00,000/-, there is an agreement for reconveyance of the property to appellant and no such deed of reconveyance was produced and case of appellant that he is in possession of property. In this case appellant do not claim any right under the agreement for reconveyance is not sustainable. In the light of this findings of Rent Control Court, I do not find any bona fides in the petition

filed before executing court that appellant had obtained possession of the property from the tenant. As found by courts below, even if appellant obtained possession from second respondent in view of the order of eviction passed against second respondent, first respondent is entitled to take delivery of the property in execution of the order of eviction. The question whether first respondent after getting possession of the property will hold the property as co-owner or as absolute owner will depend on the final result of the appeal pending against Ext.A4 judgment.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006